Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

CompTel's Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act

CC Docket No. 98-39

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") hereby submits these reply comments on behalf of itself and its affiliates. The comments filed in support of CompTel's petition are noteworthy chiefly for what they ignore. They make no attempt to explain how CompTel's proposal, which essentially erases the distinction between the terms "affiliate" and "successor or assign," squares with the Telecommunications Act's express differentiation between these terms. They disregard entirely the Commission's decision in the Non-Accounting Safeguards Order.[1] And they fail to explain why the extensive safeguards set forth in the Act and the rules that the Commission has already adopted are not sufficient to keep incumbent carriers from acting illegally. In short, the

[1] See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22054-58 [¶¶ 309-317] (1996) aff'd, Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) ("Non-Accounting Safeguards Order").

comments add nothing to CompTel's petition, and the petition should be denied.

1. There Is No Need for CompTel's Interpretation of Section 251(h)

As SBC explained in its opening comments, the Commission, in its Non-Accounting Safeguards Order, definitively addressed the issues that CompTel raises. There, contrary to CompTel's position, the Commission ruled that a BOC's section 272 affiliate was not to be treated as an "incumbent" carrier simply because it provided local exchange service. Rather, the Commission concluded the affiliate would be deemed an incumbent carrier under section 251(h) only if the incumbent had transferred to the affiliate "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)." Non-Accounting Safeguards Order, 11 FCC Rcd at 22054 [¶ 309] (emphasis added). This ruling is consonant with the structure of the Telecommunications Act, which — unlike CompTel's proposal — explicitly distinguishes between the terms "affiliate" and "successor or assign." See, e.g., 47 U.S.C. § 153(4) (a Bell operating company includes "any successor or assign," but "does not include an affiliate of any such company").

Instead of attempting to explain how CompTel's interpretation of section 251(h) can be reconciled with the Act and the Commission's precedent, the comments filed in support of CompTel's petition simply make the same unsubstantiated and misleading claims that CompTel did. For example, they vaguely assert that the establishment of incumbent affiliates will "facilitate[] a wide variety of anticompetitive strategies," MCI Comments at ii; that an incumbent's affiliate "can be expected to obtain access to the ILEC network . . . that is superior to that provided to independent CLECs," LCI Comments at 4; that "ILECs will have the ability to evade their resale obligations simply by transferring customers to the CLEC," KMC Telecom,

Inc. Comments at 3; and that the "only compelling reason an ILEC would seek to be classified legally . . . as a CLEC is for the ILEC . . . to be able to avoid legal mandates that the ILEC itself is required to perform pursuant to the 1996 Act," WorldCom, Inc. Comments at 3.

Significantly, neither CompTel nor its supporters can identify a single concrete example in which an incumbent carrier's affiliate has gained an unfair competitive advantage as a result of its relationship with the incumbent. There is a good reason for the gaping hole in their argument: Numerous mechanisms already exist to prevent such conduct. For example, as the Commission recognized in the Non-Accounting Safeguards Order, where it squarely rejected similar speculative allegations:

> To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment, we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. Our affiliate transaction rules, as modified by our companion Accounting Safeguards Order, address the BOCs' ability to engage in improper cost allocation. The rules in this Order and our rules in the First Interconnection Order and our Second Interconnection Order ensure that BOCs may not favor their affiliates. In sum, we find no basis in the record for concluding that competition in the local market would be harmed if a section 272 affiliate offers local exchange service to the public that is similar to local exchange service offered by the BOC.

Non-Accounting Safeguards Order, 11 FCC Rcd at 22057-58 [¶ 315].

The Commission made plain that section 251 requires an incumbent to treat equally all requesting carriers — whether or not they are affiliated with the incumbent. Id. at 22058 [¶ 316]. Thus, contrary to MCI's suggestions, MCI Comments at 13, if an incumbent were to provide its affiliate with "access to operational support systems (OSS) functions via a different method or system than it provides to requesting carriers under section 251, . . . such discriminatory treatment [would be] a violation of section 251(c)(3)." Non-Accounting Safeguards Order, 11

FCC Rcd at 22058 [¶ 316].

In addition, if a party believes that an incumbent or its affiliate has violated a provision of the Telecommunications Act, both federal and state laws provide comprehensive remedial schemes to address such claims. To the extent that a party is aggrieved by a State commission's approval or rejection of an interconnection agreement, it "may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and [section 252]." 47 U.S.C. § 252(e)(6). If a party takes issue with some other action by a state Commission, it can petition the FCC for an order preempting the enforcement of that action on the ground that it "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Id. § 253(a), (d). Any party aggrieved by the FCC's determination under section 253 can seek judicial review in a United States Court of Appeals. Id. § 402(a), (b); 28 U.S.C. § 2344. The States likewise have extensive administrative and judicial mechanisms for determining whether an incumbent carrier has failed to satisfy the obligations of its certification, as well as rules relating to the transfer of assets by an incumbent to an affiliate. Thus, there is simply no need for CompTel's expansive interpretation of section 251(h) — federal and state laws already offer ample protection against the kinds of conduct that CompTel and its supporters allege will occur if the petition is not granted.

2. Any Further Rulemaking On this Issue Is Unnecessary

The comments filed by interexchange carriers AT&T Corporation and Sprint Corporation further highlight the deficiencies of CompTel's petition. Instead of supporting CompTel's petition, as one might expect, these parties apparently recognize that CompTel's extreme

interpretation of section 251(h) could threaten their own plans to offer integrated packages of services. See AT&T Comments at 3 (asking Commission simply to initiate a proceeding to "specify the minimum . . . requirements with which an ILEC must comply before any affiliate could be found not to be" an incumbent under section 251(h)); Sprint Comments at 2 ("CompTel is painting with too broad a brush in framing the relief it requests"); see also Frontier Comments at 2 ("CompTel's proposed remedy and indicia of 'evasion' that it proposes are seriously flawed"). Accordingly, Sprint asks the Commission to "be very careful that its relief does not exceed the scope of the problem and does not unfairly hamper legitimate and benign operations of any carrier in the industry." Sprint Comments at 3.

Although these commenters are unwilling to adopt CompTel's radical position, they nevertheless suggest that the Commission should initiate a rulemaking regarding the appropriate interpretation of section 251(h). In this regard, however, these commenters put forth no better reason for their requests than does CompTel. AT&T says that the Commission needs to define the "minimum criteria for determining whether a carrier constitutes an incumbent local exchange carrier pursuant to Section 251(h)." AT&T Comments at 5. But the Commission has already done this in the Non-Accounting Safeguards Order: the "minimum criteria" for determining whether an incumbent's affiliate has become a successor or assign of the incumbent are whether the incumbent has transferred to the affiliate "ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)." Non-Accounting Safeguards Order, 11 FCC Rcd at 22054 [¶ 309].

Sprint's proposed tests for preventing "abuses by an ILEC" are similarly redundant of other statutory and regulatory safeguards. See Sprint Comments at 4. Sprint urges the

Commission to rule that (1) any construction by an affiliate of new facilities in an ILEC's region should be presumed unreasonable; (2) an affiliate "should not be able to provide new common carrier services"; and (3) an incumbent should be prohibited from "transferring contract customers" to an affiliate. Sprint Comments at 5-7. Whether it is appropriate for an affiliate to construct facilities to provide local exchange service or to offer new services, however, is a matter left to State commissions to decide in the first instance in considering the affiliate's specific application regarding the facilities or service. Moreover, it is unnecessary for the Commission to act on Sprint's insistence that incumbent carriers be prohibited from transferring customer contracts: the law currently prohibits an incumbent from transferring customers to an affiliate (or any other carrier) unless the incumbent complies with procedures prescribed by the Commission. 47 U.S.C. § 258.

3. CompTel and Its Supporters Ignore the Pro-Competitive Benefits of an Affiliate's Offering Local Exchange Service

Not only are the comments filed in support of CompTel devoid of any showing of a need for CompTel's expansive interpretation of section 251(h), but also they ignore entirely the pro-competitive benefits that will result from the offering of local exchange service by an incumbent's affiliate. Unlike the incumbent carrier, such affiliates will be able to provide combinations of services, including packages of long-distance, wireless, and local services, and will compete against other integrated carriers that offer similar "one-stop" shopping packages. In the end, as the Commission recognized in the Non-Accounting Safeguards Order, consumers will benefit from the lower prices and innovation that result from the affiliate's participation in the market. Non-Accounting Safeguards Order, 11 FCC Rcd at 22057-58 [¶ 315]. Thus, rather than

nurturing competition, CompTel's sweeping interpretation of section 251(h) would restrict the number of competitors in and the diversity of the market for integrated services, thereby harming consumers in the long run.

CONCLUSION

The Commission has already declined to adopt CompTel's proposal as inconsistent with the statute and not in the public interest. It has already explained that the existing safeguards, as set forth in the statute and in the Commission's rules, are adequate to prevent the discriminatory conduct by incumbents that CompTel and other commenters claim will occur. There is simply no need for the Commission to revisit an issue that it has already thoroughly considered, and SBC respectfully asks the Commission to deny CompTel's petition.

Respectfully submitted,

SBC Communications Inc.

Patricia L C Mahoney

Patricia L. C. Mahoney
140 New Montgomery Street, Rm. 1523
San Francisco, California 94105
(415) 545-7183

Their Attorneys

Robert M. Lynch
Durward D. Dupre
One Bell Plaza, Suite 3703
Dallas, Texas 75202
(214) 464-4244

Date: June 1, 1998

0185899.01

CERTIFICATE OF SERVICE

I, Kathy A. Moody, hereby certify that "Reply Comments of SBC Communications, Inc." in CC Docket No. 98-39 have been served on June 1, 1998, to the Parties of Record.

Kathy A. Moody

June 1, 1998

GENEVIEVE MORELLI
EXECUTIVE VICE PRESIDENT
AND GENERAL COUNSEL
COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M STREET, N. W., SUITE 800
WASHINGTON, D. C. 20036

DAVID L. SIERADZKI
JENNIFER A. PURVIS
HOGAN & HARTSON, L.L.P.
555 THIRTEENTH ST., N.W.
WASHINGTON, D. C. 20004

JANICE M. MYLES
COMMON CARRIER BUREAU
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N. W., ROOM 544
WASHINGTON, D. C. 20554

INTERNATIONAL TRANSCRIPTION SERVICES, INC. (ITS)
1231 20TH STREET, N. W.
GROUND FLOOR
WASHINGTON, D. C. 20036

MARK C. ROSENBLUM
LEONARD J. CALI
JAMES W. GRUDUS
AT&T CORPORATION
ROOM 3250G3
295 NORTH MAPLE AVENUE
BASKING RIDGE, NJ 07920

LEON M. KESTENBAUM
JAY C. KEITHLEY
H. RICHARD JUHNKE
SPRINT CORPORATION
1850 M STREET, N. W., 11TH FLOOR
WASHINGTON, D. C. 20036

FRANK W. KROGH
MARY L. BROWN
MCI TELECOMMUNICATIONS CORPORATION
1801 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C. 20006

CATHLEEN A. MASSEY
PUBLIC POLICY COUNSEL
& ASSISTANT GENERAL COUNSEL
NEXTLINK COMMUNICATIONS, INC.
1730 RHODE ISLAND AVE., N. W., SUITE 100
WASHINGTON, D. C. 20036

DANIEL M. WAGGONER
JAMES S. BLITZ
ROBERT S. TANNER
DAVIS WRIGHT TREMAIN L.L.P.
1155 CONNECTICUT AVENUE, SUITE 700
WASHINGTON, D. C. 20036

ANNE K. BINGAMAN
DOUGLAS W. KINKOPH
LCI INTERNATIONAL TELECOM CORP.
8180 GREENSBORO DRIVE, SUITE 800
MCLEAN, VA 22102

PETER A. ROHRBACH
LINDA L. OLIVER
HOGAN & HARTSON, L.L.P.
COLUMBIA SQUARE
555 THIRTEENTH STREET, N. W.
WASHINGTON, D. C. 20004

CHERIE R. KISER
A. SHEBA CHACKO
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.,
ATTORNEYS FOR INTERMEDIA COMMUNICATIONS, INC.
701 PENNSYLVANIA AVENUE, N. W., SUITE 900
WASHINGTON, D. C. 20004

RILEY M. MURPHY
EXECUTIVE VICE PRESIDENT
LEGAL AND REGULATORY AFFAIRS
JAMES C. FALVEY
VICE PRESIDENT REGULATORY AFFAIRS
E.SPIRE COMMUNICATIONS, INC.
133 NATIONAL BUSINESS PARKWAY, SUITE 200
ANNAPOLIS JUNCTION, MARYLAND 20701

BRAD E. MUTSCHELKNAUS
JOHN J. HEITMANN
KELLEY DRYE & WARREN L.L.P.
1200 19TH STREET, N. W., FIFTH FLOOR
WASHINGTON, D. C. 20036

CATHERINE R. SLOAN
RICHARD L. FRUCHTERMAN III
RICHARD S. WHITT
DAVID N. PORTER
WORLDCOM, INC.
1120 CONNECTICUT AVENUE, N.W., SUITE 400
WASHINGTON, D. C. 20036

CINDY Z. SCHONHAUT
SENIOR VICE PRESIDENT, GOVERNMENT AND EXTERNAL AFFAIRS
ICG COMMUNICATIONS, INC.
161 INVERNESS DRIVE WEST
ENGLEWOOD, CO 80112

ALBERT H. KRAMER
MICHAEL CAROWITZ
DICKSTEIN SHAPIRO MORIN & OSHINSKY
2101 L STREET, N. W.
WASHINGTON, D. C. 20037

RICHARD J. METZGER
EMILY M. WILLIAMS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
888 17 STREET, N. W., SUITE 900
WASHINGTON, D. C. 20006

TERESA MARRERO
SENIOR REGULATORY COUNSEL – FEDERAL
TELEPORT COMMUNICATIONS GROUP, INC.
TWO TELEPORT DRIVE
STATEN ISLAND, NY 10311

ANDREW D. LIPMAN
MARY C. ALBERT
SWIDLER & BERLIN, CHTD.
3000 K STREET N. W., SUITE 300
WASHINGTON, D. C. 20007

MICHAEL J. SHORTLEY, III
ATTORNEY FOR FRONTIER CORPORATION
180 SOUTH CLINTON AVENUE
ROCHESTER, NY 14646

DAVID W. ZESIGER
DONN T. WONNELL
INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE
1300 CONNECTICUT AVENUE, N. W., SUITE 600
WASHINGTON, D. C. 20036

CHARLES C. HUNTER
CATHERINE M. HANNAN
HUNTER COMMUNICATIONS LAW GROUP
1620 I STREET, N. W., SUISTE 701
WASHINGTON, D. C. 20006

MADELYN M. DEMATTEO
ALFRED J. BRUNETTI
THE SOUTHERN NEW ENGLAND TELEPHONE
COMPANY
227 CHURCH STREET
NEW HAVEN, CN 06510

MARK L. EVANS
GEOFFREY M. KLINEBERG
REBECCA A. BEYON
KELLOGG, HUBER, HANSEN, TODD & EVANS,
P.L.L.C.
1301 K STREET, N. W., SUITE 1000 WEST
WASHINGTON, D. C. 20005

WILLIAM B. BARFIELD
M. ROBERT SUSTHERLAND
DAVID G. RICHARDS
BELLSOUTH CORPORATION
1155 PEACHTREE STREET, N. E., SUITE 1800
ATLANTA, GA 30309-3610

GARY L. PHILLIPS
COUNSEL FOR AMERITECH CORPORATION
1401 H STREET, N. W., SUITE 1020
WASHINGTON, D. C. 20005

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
LAWRENCE E. SARJEANT
U. S. TELEPHONE ASSOCIATION
1401 H STREET, N. W., SUITE 600
WASHINGTON, D. C. 20005

GAIL L. POLIVY
GTE SERVICE CORPORATION
1850 M STREET, N. W., SUITE 1200
WASHINGTON, D. C. 20036

JOHN F. RAPOSA
GTE SERVICE CORPORATION
HQE03J27
600 HIDDEN RIDGE
IRVING, TX 75038

R. MICHAEL SENKOWSKI
JEFFREY S. LINDER
TIMOTHY J. SIMEONE
WILEY, REIN & FIELDING
1776 K STREET, N. W.
WASHINGTON, D. C. 20006

EDWARD D. YOUNG III
MICHAEL E. GLOVER
JAMES G. PACHULSKI
BELL ATLANTIC
1320 NORTH COURT HOUSE ROAD, 8TH FLOOR
ARLINGTON, VA 22201

L. MARIE GUILLORY
NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION (NTCA)
2626 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20037